IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: ERIN HAMRICK f/k/a ERIN COLLIER, Appellant, v. BENJAMIN COLLIER, Respondent.	No. 38953-3-II UNPUBLISHED OPINION

Van Deren, C.J. — Erin Hamrick appeals the trial court's order of default and its order denying her motion to set aside default in the dissolution of marriage action between Hamrick and Benjamin Collier. She argues that the trial court did not have authority to consider Collier's motion to compel because Collier did not comply with the CR 26(i) conference requirements before filing his motion. Under the facts of this case, we affirm the trial court's ruling.

FACTS

On April 1, 2008, Collier's attorney served Hamrick's former attorney, Robert Falkenstein, with interrogatories that were due May 12. On April 28, Falkenstein withdrew as Hamrick's attorney. Falkenstein gave Collier Hamrick's California address but did not provide Hamrick's telephone number. On May 15, Collier's attorney sent a letter to Hamrick's California

address, stating:

> Please be advised that the discovery request that was mailed to you on 4/01/08 was due on 5/12/08. As of this writing, we have not received your answers to that request or the requested documentation. I will extend the deadline for an additional 20 days (6/04/08) to allow you to provide any and all requested information and documentation. If I do not receive the requested documentation, I will be filing a Motion to Compel with reference to this matter.
>
> Thank you for your prompt attention to this matter. If you have any questions regarding this correspondence, please contact my office at [phone number].

Clerk's Papers (CP) at 4 (emphasis omitted). Hamrick did not provide answers to the interrogatories before June 4 and did not respond to Collier's counsel's letter.

Hamrick apparently returned to her Longview, Washington, residence in June 2008. On June 19, Collier sent "copies of all documentation for the motion to amend temporary orders"[1] to Hamrick's Longview address. CP at 61. On July 2, Hamrick confirmed her Longview address and telephone number with the trial court. She did not answer the April 1 interrogatories so, also on July 2, Collier moved to compel Hamrick's response to the interrogatories.

Hamrick provided some answers to the April 1 interrogatories on or about July 9. On July 18, the trial court found that Hamrick's interrogatory answers were insufficient and gave her until July 30 to provide complete answers; it rescheduled the motion to compel to August 1. At that time, the trial court "warned [Hamrick that] if her discovery answers were insufficient, the court could strike all of her pleadings and enter an Order of Default." CP at 74. On August 1, 2008, the trial court "found that [Hamrick's] discovery answers were mostly left blank and that she had an obligation to provide due diligence in producing the requested documentation under her control." CP at 75. The trial court ordered Hamrick to "produce discovery answers no later than

[1] This motion does not appear in the appellate record, but is not relevant to the issues on appeal.

[August 21] to be reviewed by the court on [August 22]." CP at 75. Hamrick failed to appear in court on August 22. The trial court entered an order of default on the same day. It awarded Collier $500 in attorney fees. Final dissolution pleadings were "entered by default on September 19," almost an entire month after Hamrick had failed to appear in court and without any further answers to interrogatories provided as ordered by the court on July 18 and August 1. CP at 46.

On December 9, Hamrick moved to set aside the order of default.[2] She argued that "[Collier's] attorney's letter [about her failure to answer the interrogatories] is a one-way communication not in compliance with CR 26(i)" and that it "does not ask or invite [Hamrick] to participate in a CR 26(i) conference . . . . As such, the [trial] court lacked authority on the motion to compel." Hamrick argued that, because Collier did not comply with CR 26(i), "the order of default must be vacated." CP at 55. Hamrick additionally argued that she did not willfully violate an order and, therefore, default was not a proper sanction. On January 23, 2009, the trial court denied Hamrick's motion to set aside the default entered on August 22. Hamrick appeals.

ANALYSIS

I. Sufficient Appellate Record

We preliminarily consider Collier's argument that Hamrick has failed to provide a sufficient record on appeal. We will not consider matters not in the record. The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994); RAP 9.2(b). "An insufficient record on appeal precludes review of the alleged errors."

[2] Hamrick was represented by counsel at the January 16, 2009, hearing on her motion to set aside default.

Bulzomi, 72 Wn. App. at 525. Hamrick assigns error to five issues on appeal. We consider each assignment of error to determine whether Hamrick provided a sufficient record for our review.

A. Assignment of Error 1

The trial court erred by granting the motion for default based on alleged discovery violations without first requiring compliance with CR 26(i).

The record is sufficient for us to consider assignment of error 1. Both parties agree that the trial court based its determination that Collier complied with CR 26(i) on the May 15 letter asking for Hamrick's compliance and offering to discuss the matter by telephone. Further, the trial court's findings of fact specifically point to this letter as adequate compliance with the rule. The letter is contained within the appellate record. Furthermore, this court considers de novo whether a trial court possessed the authority to hear a particular matter. *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001). Here, the record also reflects that, before imposing any sanction for refusing to comply with ordered discovery, the trial court first ordered Hamrick, on two occasions, to adequately supplement her interrogatory answers and the record further shows that she failed to abide by the trial court's orders and failed to appear at the August 22 scheduled hearing, where the trial court was to review her compliance with its orders. Therefore, the record is sufficient for this court to consider the issue.

B. Assignment of Error 2

The court erred by granting the motion for default without first considering other alternatives as required in CR 37(b). Before a trial court imposes a harsh sanction, such as default under CR 37(b)(2)(c), it must consider whether (1) there was a willful violation of a discovery order, (2) the violation substantially prejudiced the moving party's ability to prepare for trial, and

(3) whether a lesser sanction would be sufficient. *Mayer v. Sto Inds., Inc.*, 156 Wn.2d 677, 688, 690, 132 P.3d 115 (2006).

The record contains the trial court's August 22 findings of fact. The trial court's findings detail the extensions the trial court granted Hamrick to allow her to comply with discovery before it entered sanctions against her.[3] But the transcripts for the August 1 and August 22 hearings, at which the trial court presumably determined that default was warranted, are not a part of the appellate record. Nevertheless, the record provided is clear that the trial court both considered and imposed lesser sanctions (i.e., ordering her to comply by two dates certain and setting a review hearing) to gain Hamrick's compliance with discovery. These orders allowed the trial court to ascertain whether Hamrick's refusal to comply with discovery was willful, especially in light of its warnings about more severe sanctions for her failure to do so. It did not grant the default sanction until she twice failed to comply with the court's own discovery orders, entered after it articulated the possibility of default for her failure to comply.

C. Assignment of Error 3

The court erred in granting the motion for default against a pro se litigant, who appeared and attempted to answer interrogatories without first setting forth the specifics of the discovery violations.

We do not consider assignment of error 3. The appellate record does not contain transcripts from the July 18 and August 1 hearings, wherein the trial court determined that Hamrick's interrogatory answers were insufficient, nor does it contain a copy of the

[3] To the extent the findings set forth the extensions given to Hamrick, they describe the procedural history of this case. These findings are unchallenged and thus they are verities on appeal. *In re Marriage of Knight*, 75 Wn. App. 721, 732, 880 P.2d 71 (1994).

interrogatories and Hamrick's allegedly insufficient answers. Though the trial court's findings of fact state that Hamrick "produced insufficient and incomplete discovery answers," the record contains no evidence of the exchange between the trial court and Hamrick regarding the insufficiencies. CP at 74. In addition, Hamrick's pro se status is not relevant on appeal, since pro se litigants are held to the same standard as litigants represented by counsel. *Carver v. State*, 147 Wn. App. 567, 575, 197 P.3d 678 (2008). We do not consider this issue on appeal. *Bulzomi*, 72 Wn. App. at 525. Accordingly, the trial court's determination that Hamrick's interrogatory answers were insufficient stands.

D. Assignment of Error 4

The trial court erred in denying Hamrick's motion to set aside the default. We consider assignment of error 4 because Hamrick provided the transcripts for the hearing considering this issue and because the record contains both parties' briefs.

E. Assignment of Error 5

The trial court erred in denying Hamrick's request for attorney fees on her motion to set aside default. As with assignment of error 4, Hamrick has provided a sufficient record to consider the motion to set aside default, since she provided both the transcript and the briefs regarding the motion.

II. Motion to Compel and Compliance with CR 26(i)

Hamrick argues that the trial court erred in considering Collier's motion to compel discovery "without first requiring compliance with CR 26(i)." Br. of Appellant at 1. Collier argues that, because Hamrick failed to assign error to the trial court's finding that Collier's counsel complied with CR 26(i), this finding is a verity on appeal. In the alternative, Collier

argues that his counsel complied with CR 26(i) when she sent the May 15 letter to Hamrick's California address, since this was "counsel's only method of communication with [Hamrick]." Br. of Resp't at 20.

A. Standard of Review

We generally review a trial court's default orders and its consideration of a motion to compel discovery for an abuse of discretion. *Clarke v. Office of Att'y Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006); *Rudolph*, 107 Wn. App. at 866. But where, as here, an appellant challenges the trial court's authority to hear a particular matter and the trial court's decision regarding its own authority to hear the matter "rests . . . on a question of law," we review the decision de novo. *Rudolph*, 107 Wn. App. at 866.

B. Mislabeled Conclusion of Law

Collier argues that his compliance with CR 26(i)[4] is a verity on appeal, since the trial court

[4] Collier also argues that CR 26(i) does not apply since Hamrick was not represented by counsel at the time of the motion to compel and CR 26(i) specifically states that "[t]he court will not entertain any motion or objection . . . unless *counsel* have conferred with respect to the motion or objection." CR 26(i) (emphasis added). He cites *Washington Practice*, which notes that "one of the purposes of [CR 26(i)] is 'to encourage professional courtesy between attorneys.'" Br. of Resp't at 19 (quoting 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 26 § 22, at 14 (4th ed. Supp. 2004)).

In the current edition of *Washington Practice*, the authors include the following comment regarding the 1992 amendment to CR 26, which added subsection (i):

> The proposed new section (i) to Superior Court Civil Rule 26 would require a conference between counsel, and certification of compliance with that requirement, before a discovery motion may be brought to court. The rationale for the rule is twofold: to encourage professional courtesy between attorneys, and to reduce the number of discovery controversies brought before the courts for adjudication.
>
> The amendment is patterned after King County Local Rule 37, though the committee believed it belonged more appropriately in rule 26, which covers discovery matters in general. Unlike the King County rule, the proposed amendment makes clear that the conference may take place by telephone and that it must be "mutually convenient." If the court finds a willful failure or refusal to

found that "the attorney offered the fact of a CR 26(i) conference" and Hamrick failed to assign error to this finding of fact. CP at 74.

Unchallenged findings of fact are verities on appeal. *Cascade Valley Hosp. v. Stach*, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009). But "[w]e review conclusions of law mislabeled findings of fact de novo as conclusions of law." *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 265, 218 P.3d 180 (2009). The determination that Collier's counsel complied with the conference requirements of CR 26(i) is a conclusion of law. Therefore, though it is labeled a finding of fact in the trial court's order, we consider this issue de novo.

C. Authority To Consider Collier's Motion To Compel

CR 26 states that a trial court "will not entertain any motion or objection" regarding the discovery rules "unless counsel have conferred with respect to the motion or objection." CR 26(i). It further requires that "[c]ounsel for the moving . . . party shall arrange for a mutually convenient conference in person or by telephone." CR 26(i). Finally, CR 26(i) states, "Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met." The conference rules contained in CR 26(i) is mandatory, rather than permissive. *Rudolph*, 107 Wn. App. at 866.

In this case, Collier filed a motion to compel answers to the April 1 interrogatories.

---

confer in good faith, it may apply the sanctions provided in rule 37(b).
3A Karl B. Tegland, Washington Practice: Rules Practice, CR 26, § 57, drafters' cmt. at 619-20 (5th ed. 2006).

But "the rules of procedure apply equally to parties represented by counsel and parties who wish to take the risk of representing themselves." *City of Bonney Lake v. Delany*, 22 Wn. App. 193, 196, 588 P.2d 1203 (1978). Because the rules apply equally to pro se litigants and the rationale for the rule also includes the reduction of discovery controversies, we hold that CR 26(i) applies to pro se litigants.

Collier's counsel was required under CR 26(i) to "arrange for a mutually convenient conference in person or by telephone." Only after such a conference and with certification of that conference in Collier's motion,[5] would the trial court then consider Collier's motion to compel. CR 26(i).

Collier sent a letter to Hamrick's California address on May 15, 2008. The letter stated, in part, "[W]e have not received your answers to [the discovery] request . . . . If I do not receive the requested documentation, I will be filing a Motion to Compel . . . . If you have any questions regarding this correspondence, please contact my office at [phone number]." CP at 4. Collier and Hamrick did not discuss the discovery request by telephone or in person, nor did she provide answers to the interrogatories.

The trial court considered Collier's motion to compel on July 18. Both Hamrick and Collier appeared on that date and apparently had also met at the court house on July 2. At no time did Hamrick raise objection to the court's consideration of Collier's request that the court assist in getting Hamrick to comply with the discovery he had requested. Had she done so, the trial court could have continued the hearing and ordered Collier's counsel and Hamrick to conduct the CR 26 (i) conference in an attempt to agree on a timely and full response from Hamrick to avoid a future hearing, thereby fulfilling the purpose of the rule. Instead, on July 18, the trial court allowed Hamrick until July 30 to fully answer the interrogatories and requests for discovery, which had originally been due on May 12 and whose due date was extended by Collier to June 4.

At the subsequent August 1 hearing, following the extended time for her responses,

[5] Collier's motion to compel contains the following language, "I hereby certify that the conference requirements of Civil Rule 26(i) were completed when I sent my letter to the pro se party." CP at 3.

Hamrick and Collier again both appeared and Hamrick again failed to raise any issue about failure to conference under CR 26(i). Instead of imposing sanctions, the trial court again extended her time for full responses until August 21. Hamrick not only failed to supplement her inadequate answers by August 21, but she failed to appear at the August 22 hearing set by the trial court to review the adequacy of her responses. The trial court was aware that both parties had met in person at least twice at the court when it heard the matter, which occasions certainly provided the opportunity for them to agree on a date certain for Hamrick's interrogatory answers, should she have intended to supply adequate answers.

Because Hamrick did not raise the CR 26(i) issue in the July 18 or August 1 hearings, the trial court's August 22 default order did not address CR 26(i) or note its findings regarding Collier's compliance with the conference requirements. The trial court mentioned the letter by stating that "supplemental requests for answers were made on 05/15/08." CP at 6.

In its later order denying Hamrick's motion to set aside the default, the trial court noted that Hamrick's former attorney supplied only a California address and "[Collier's] counsel had no other contact information." CP at 73. It found that "the attorney offered the fact of a CR[]26(i) conference. The correspondence (as the only means available for contact) identified that a motion to compel would follow if discovery was not provided and it invited [Hamrick] to call the attorney to discuss the contents of the correspondence." CP at 74. Hamrick does not challenge this finding of fact and it is, therefore, a verity on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

In *Rudolph*, plaintiff Rudolph responded to some interrogatories and objected to others. 107 Wn. App. at 864. Empirical Research Systems' counsel faxed a motion to compel to

Rudolph's counsel, who responded by faxing additional discovery responses and indicating that other documents would be forwarded as soon as possible. *Rudolph*, 107 Wn. App. at 864. Empirical's counsel then "sent a letter to Rudolph's counsel indicating that he had confirmed his Motion to Compel" with the court, to which Rudolph's counsel responded via letter that the motion to compel was in violation of CR 26. *Rudolph*, 107 Wn. App. at 865. The trial court heard Empirical's motion to compel and dismissed Rudolph's complaint. *Rudolph*, 107 Wn. App. at 865. On appeal, we held that the requirements of CR 26(i) are mandatory. *Rudolph*, 107 Wn. App. at 866. We further held that the moving party's argument that "'a written request for compliance pursuant to Rule CR 26 is better and more effective than an oral telephone call'" was without merit because it was "contrary to the plain language of the rule requiring a conference in person or by telephone." *Rudolph*, 107 Wn. App. at 867 (quoting *Rudolph* Br. of Resp't at 10). In a footnote, we stated that "[a] transmittal letter . . . cannot satisfy the requirements of CR 26(i)." *Rudolph*, 107 Wn. App. at 867 n.2.

In *Case v. Dundom*, 115 Wn. App. 199, 58 P.3d 919 (2003), Case sent three letters to Dundom with regard to discovery requests.

> The first letter . . . transmitted the interrogatories and requests for production and directed response within 30 days. The second . . . noted that Dundom had not yet responded and warned that Case would note a compliance motion . . . but did not mention a conference under CR 26(i). The third . . . included the order granting sanctions [and] stated the new compliance deadline.

Case, 115 Wn. App. at 202 n.1. The trial court considered Case's motion to compel and entered judgment against Dundom. *Case*, 115 Wn. App. at 201. We held that "traditional mail . . . is not a contemporaneous, two-way communication" as required by CR 26(i). *Case*, 115 Wn. App. at 204. We noted that the three letters sent by Case did not mention CR 26(i) or a conference but,

"[e]ven if one did, they would not have satisfied Case's obligation under CR 26(i)." *Case*, 115 Wn. App. at 202 n.1. We also stated that CR 26(i) requires "literal compliance" or the trial court lacks the authority to hear a motion to compel. *Case*, 115 Wn. App. at 203.

In *Clarke*, the parties spoke via telephone and resolved all discovery issues save for two interrogatories. 133 Wn. App. at 780. The parties spoke again by telephone and the State "informed Clarke's attorney that the State had compiled the information and that it was available for Clarke's review" at the Attorney General's Office. *Clarke*, 133 Wn. App. at 780. The parties agreed on a time for Clarke's attorney to review the discovery materials; however, Clarke's attorney failed to appear at the Attorney General's Office. Clarke's attorney filed a motion to compel "without a further CR 26(i) conference to discuss any remaining discovery issues." *Clarke*, 133 Wn. App. at 780. We held that "[u]nder these circumstances, we c[ould]not construe the [second] telephone discussion between the attorneys . . . as a conference satisfying CR 26(i)" and "[t]hus, the trial court did not have authority to hear Clarke's motions to compel." *Clarke*, 133 Wn. App. at 781.

Here, as in *Rudolph* and *Case*, Collier's counsel sent a letter requesting compliance with discovery, but did not arrange for a CR 26(i) conference and no conference took place. Collier's counsel made no additional effort to arrange a conference after she possessed Hamrick's local contact information or when the parties met in person in court on July 2, 2008. Although Collier's attorney lacked Hamrick's telephone number, she could have sent additional correspondence to Hamrick indicating that a conference was required or requesting Hamrick's contact information. But here, both parties were present before the trial court on at least two occasions, clearly at odds about whether Hamrick was going to answer the interrogatories; and

the trial court on those occasions, July 18 and August 1, granted Hamrick additional time to properly supplement her interrogatory answers. Hamrick did not raise any objection to Collier's procedural failure to ask for a conference to set a date for Hamrick's compliance with the discovery rules. The trial court's actions extending time to Hamrick to adequately answer the discovery requests clearly cured any prejudice arising from Collier's failure to ask for a conference because the end result—additional time to respond to discovery before the imposition of sanctions or resolution of the case—was the same. The issue presents itself on appeal because Hamrick simply refused to comply with discovery requests or with the trial court's orders.

Under these circumstances, we hold that Collier's failure to comply with CR 26(i) was waived by Hamrick and that the trial court's responses to Collier's motion to compel—twice setting dates certain for production of the requested discovery—satisfied the intent of the rule, making a conference superfluous. Without objection being raised by Hamrick, bringing the oversight to the trial court's attention, the trial court was not deprived of authority to order Hamrick to properly answer the interrogatories before considering sanctions under Collier's August 22 motion to compel.

Because we hold that the trial court's two orders, which granted Hamrick additional time to answer the discovery requests before it considered sanctions under CR 37, accomplished the purposes of CR 26(i) and because Hamrick failed to provide any discovery in response to the trial court's two orders granting her additional time, and because Hamrick failed to raise the CR 26(i) issue despite repeated opportunities to do so, we hold that the trial court did not err in ultimately entering the default order and in denying Hamrick's motion for reconsideration.[6]

[6] *Cf. Amy v. Kmart of Washington LLC*, No. 62312-5, 2009 WL 5094763, at *1 (Wash. Ct. App. Dec. 8, 2009) (a trial court has authority to determine whether it shall hear a motion for sanctions

ATTORNEY FEES

Hamrick argues that she should be awarded attorney fees "based on violations of CR 26(i) and based upon need and ability to pay, pursuant to RCW 26.09.140." Br. of Appellant at 13. She argues that, because Collier "brought a motion without complying with the CR 26(i) conference provision," she is entitled to attorney fees under CR 26 and CR 37. Br. of Appellant at 13. Hamrick contends that "[t]he trial court's denial of attorneys fees should . . . be reversed."[7] Br. of Appellant at 1.

No request for attorney fees appears in Hamrick's motion to set aside default or in her declaration and brief supporting that motion. During the January 16, 2009, hearing regarding Hamrick's motion to set aside default, Hamrick's attorney requested $1,500 in attorney fees. Her attorney argued that "CR 26 requires a discussion with regards [sic] to attorney[] fee[s] for violating that provision." Report of Proceedings (RP) at 12. Her attorney further argued that Hamrick "has substantial need[,]she is unemployed at this particular point and Mr. Collier is employed and has an income." RP at 13.

CR 37(a)(4) provides that:

> If the [discovery or sanction] motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

---

notwithstanding allegedly deficient compliance with a CR 26(i) certification).

[7] Collier does not request attorney fees on appeal.

Here, the trial court granted Collier's motion and denied Hamrick's motion to set aside. Therefore, it did not abuse its discretion in granting attorney fees to Collier and denying Hamrick's motion for attorney fees.

Furthermore, it was not an abuse of discretion for the trial court to deny Hamrick attorney fees under RCW 26.09.140, which states, "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter." Because this statute is permissive, the trial court did not abuse its discretion in deciding not to award Hamrick attorney fees based on her financial need. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994) (decision to award fees is within the trial court's discretion).

Hamrick argues that this court should award her attorney fees "for having to bring this appeal." Br. of Appellant at 14. But because she is not the prevailing party on appeal, we do not award her attorney fees. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992) (whether to grant fees under RCW 26.09.140 for costs on appeal is discretionary).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

No. 38953-3-II

Houghton, J.

Quinn-Brintnall, J.